PP v. RAVICHANTHIRAN GANESAN

HIGH COURT MALAYA, JOHOR BAHRU
SHAHNAZ SULAIMAN JC
[CRIMINAL APPEAL NO: JA-41LB-6-05-2021]
23 NOVEMBER 2021

Abstract – *A witness' refusal to answer a question posed by an investigation officer pursuant to s. 112 of the Criminal Procedure Code which if answered would expose him to a criminal charge or penalty cannot amount to an offence of 'voluntarily obstructing a public servant in the discharge of his public function' within the meaning of s. 186 of the Penal Code; a witness is well within his right not to answer such a question. An offence under s. 186, in any case, cannot bite without the alleged obstruction being wilful which in turn connotes something which is done without lawful excuse. Further, the word 'obstruction' in the section means actual obstruction and implies the use of criminal force; accordingly, it is insufficient to prove mere threats or threatening language or mere abuse.*

CRIMINAL PROCEDURE: *Police investigation – Refusal to answer question – Email forgery – Investigation required password to email – Whether refusal to answer question within right – Whether refusal amounted to offence under s. 186 of Penal Code – Criminal Procedure Code, s. 112*

CRIMINAL LAW: *Offences – Obstructing public servant from carrying out official duties – Email forgery – Investigation required password to email – Whether refusal to answer question within right – Whether refusal amounted to offence under s. 186 of Penal Code – Whether there was voluntary obstruction of public servant from carrying out official duties – Whether there was physical obstruction or criminal force – Criminal Procedure Code, s. 112*

The police had conducted an investigation into a report lodged against the respondent, where the latter was said to have forged the complainant's email, resulting in a loss of RM200,000. While recording the respondent's statement, pursuant to s. 112 of the Criminal Procedure Code ('CPC'), the police officer in charge ('SP1') had sought the password to the respondent's e-mail but the latter refused to divulge the same. This led to a charge being leveled against the respondent, at the Magistrate's Court, for obstructing SP1 from carrying out his official duties, namely by not giving the e-mail password, an offence under s. 186 of the Penal Code ('PC'). At the conclusion of the prosecution's case, the Magistrate found that the prosecution failed to establish a *prima facie* case against the respondent. The

A respondent was acquitted and discharged without being called to enter defence. Hence, the present appeal. The issue that arose for determination was whether the respondent's refusal to provide the information requested by SP1, specifically the email password, amounted to an offence under s. 186 of the PC.

B **Held (dismissing appeal; affirming decision of Magistrate):**

(1) Section 112 of the CPC requires a person making a statement under this section to answer all questions relating to the case. The person is also legally bound to state the truth; whether or not the statement is made wholly or partly in answer to the question. Nonetheless, a person C making a statement under s. 112 of the CPC may refuse to answer any question; the answer to which would have a tendency to expose him to a criminal charge or penalty. (paras 26 & 27)

(2) The respondent was well within his right to refuse to answer SP1's question in relation to the email password, as provided in s. 112 of the D CPC. There was no physical obstruction or criminal force. Consequently, it could not be that, by exercising his right not to answer the question, the respondent was considered to have obstructed a public servant in discharge of his public functions. (paras 29, 36 & 39)

E **(3)** The authorities demonstrated that, for an offence under s. 186 of the PC, the element that the offender had voluntarily obstructed a public servant in discharge of his public functions must be present. The charge must state that the public servant was carrying out his public functions when he was obstructed by the respondent. A scrutiny of the charge against the F respondent found this element missing. Therefore, the charge was defective. (para 47)

Case(s) referred to:
Ah Poon & Ors v. PP [2006] 5 CLJ 521 HC ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
PP v. Mohamad Sabu [2012] 5 CLJ 246 HC ***(refd)***
G *PP v. Nazarid Fernandez [1953] 1 LNS 75 HC* ***(refd)***
Tan Teck Yam v. PP [1967] 1 LNS 186 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 116B, 152, 153, 316
Penal Code, ss. 39, 186

H

Other source(s) referred to:
Mallal's Criminal Procedure, 8th edn, p 635
Ratanlal & Dhirajlal's Law of Crimes, 28th edn, vol 1, para, 15, pp 888, 988, 998

For the appellant - Nurhayati Muhammad Fathullah; DPP
I *For the respondent - Siva Shanker; M/s G Ravi*

Reported by Najib Tamby

JUDGMENT

Shahnaz Sulaiman JC:

Introduction

[1] This is an appeal against the decision of the learned Magistrate in Johor Bahru given on 28 April 2021 who found the appellant had failed to prove a *prima facie* case against the respondent and proceeded to acquit and discharge the respondent at the end of the prosecution's case.

Background

The Charge

[2] In this case, the respondent was charged at the Magistrate's Court in Johor Bahru for an offence under s. 186 of the Penal Code. The charge against the respondent reads as follows:

> Pertuduhan Pindaan
>
> Bahawa kamu pada 29.5.2019 jam lebih kurang 1230 tengah hari bertempat di Pejabat Siasatan Jenayah Komersial IPD Johor Bahru Selatan, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Takzim, telah dengan sengaja telah menghalang anggota polis menjalankan tugas dengan enggan memberi kerjasama bagi membantu siasatan yang sedang dijalankan. Oleh yang demikian, kamu telah melakukan suatu kesalahan dan boleh dihukum di bawah seksyen 186 Kanun Keseksaan.

Brief Facts

[3] On 29 May 2019 at 12.30 noon at the Pejabat Siasatan Jenayah Komersial IPD Johor Bahru Selatan, Insp Calvin a/l Joseph (SP1) recorded the respondent's statement pursuant to s. 112 of the Criminal Procedure Code. This was in relation to an investigation involving a commercial crime report number JBS/0158/18 against the respondent.

[4] The complainant in the case JBS/0158/18 alleged the respondent had forged his email resulting in a loss of RM200,000.

[5] As part of SP1's investigation into the police report JBS/0158/18, SP1 had sought the password from the respondent pursuant to s. 116B of the Criminal Procedure Code to complete his investigations. The respondent refused to give SP1 his email password during the recording of the respondent's s. 112 of the Criminal Procedure Code statement.

[6] Following that incident, SP1 lodged a police report Larkin/017578/19 stating that the respondent was in contravention of s. 116B of the Criminal Procedure Code for refusing to give his email password to SP1 as part of SP1's investigation.

[7] This case was investigated by Insp Shahrul Hazwan bin Shamsudin (SP2). The respondent was subsequently charged under s. 186 of the Penal Code for obstructing SP1 from carrying out his official duties by not providing his email password.

Learned Magistrate's Decision

[8] At the end of the appellant's case, the learned Magistrate found that the appellant had failed to establish a *prima facie* case against the respondent. The learned Magistrate went on to acquit and discharge the respondent without calling for defence.

[9] Aggrieved by the decision of the learned Magistrate, the appellant has appealed.

Principles Relating To Appellate Intervention

[10] In relation to appeals, s. 316 of the Criminal Procedure Code provides:

> **316. Decision on appeal**
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[11] Mohd Zawawi Salleh JCA (as His Lordship then was) in *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 2 AMCR 350 explained the principles relating to appellate intervention as follows:

> [13] Application of the correct standard review has not been proved exceedingly difficult in cases involving purely factual or purely legal questions. It is trite that the appropriate standard of review for purely legal questions is *de novo* review where the appellate court is not required to give evidence to the rulings of the trial judge. Rather, *it is free to perform its own analysis of the legal issue presented. When the finding of the trial judge is factual, however, the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly*

wrong (see *China Airlines Ltd v. Maltran Air Corporation Sdn Bhd (formerly known as Maltran Air Services Corporation Sdn Bhd) and Another Appeal* [1996] 2 AMR 2233; [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zaharah A Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2012] 1 AMR 209; [2011] 1 LNS 1015, *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 4 AMR 55; [2013] 2 MLJ 650; [2013] 1 LNS 1). *The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:*

(a) by reason of some non-direction or mix-direction or otherwise the judge erred in accepting the evidence which he or she did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account, or failed to take into account some matter which he or she ought to have taken into account; or

(c) it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

(d) in so far aside judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.

[14] What, then, is the appropriate standard of review for the appellate court to apply in mixed question of fact and law? *In our view, the appropriate standard of review in this situation would be to give appropriate deference to the trial judge's factual finding but to reserve for the appellate court the ability to independently evaluate the legal effect of those factual finding.* (emphasis added)

[12] Reference was made to *Mallal's Criminal Procedure* (8th edn) at p. 635 which stated the following pertaining to s. 316 of the Criminal Procedure Code:

As a general rule, an appellate court will not interfere with the findings of fact by the lower court. However, there are exceptions to this general rule. An appellate court is always empowered to interfere and must interfere if the findings of fact of the trial judge suffer from some serious error or the decision is against the weight of evidence. In such a case the appellate court has a duty to make up and must make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of the witnesses comes into question but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly. (emphasis added)

[13] Bearing the principles of appellate intervention in mind, this court will proceed to consider the appeal.

A **Analysis And Findings**

[14] Section 186 of the Penal Code reads as follows:

> **186. Obstructing public servant in discharge of his public functions.**
>
> Whoever voluntarily obstructs any public servant in the discharge of his
B public functions, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand ringgit, or with both.

[15] According to *Ratanlal & Dhirajlal's Law of Crimes*, 28th edn, vol. 1 at p. 888 for an offence under s. 186 of the Penal Code, the ingredients are:

C
1) Voluntary obstruction to a public servant,

2) Such obstruction must be in the discharge of public functions of such public servant.

[16] This court now proceed to consider if the ingredients of the offence
D under s. 186 of the Penal Code have been fulfilled in this case.

(i) Voluntary Obstruction To A Public Servant

[17] For an offence under s. 186 of the Penal Code, the appellant must establish that there was *mens rea* on the part of the appellant. This section
E requires the obstruction must be made voluntarily. In *Ratanlal & Dhirajlal's Law of Crimes* (*supra*) at para. 15 p. 998 said:

> 15. *Mens rea* – In order to constitute an offence under this section, the obstruction must be 'wilful'. It is, therefore, not enough to prove obstruction by the accused to a public servant **but it must also be proved that the intention** was encompassed with some sort of hostility towards
F such public servant. (emphasis added)

[18] Reference was made to the case of *Tan Teck Yam v. PP* [1967] 1 LNS 186, where Raja Azlan Shah J (as HRH then was) stated the following:

> For an offence *under section 186 of the Penal Code the prosecution has to prove*
G *the following: (1) that there was obstructing of a public servant, (2) that the public servant was at that time discharging this public function, and (3) that the person obstructing did so voluntarily.* It is in my view clear that to obstruct under section 186 of the Penal Code is to do an act which makes it more difficult for a public servant to carry out his duties. I take that definition of "obstruction" from the case of *Hinchliffe v. Sheldon*. It is therefore quite
H clear that the appellant was making it more difficult for the chief assistant district officer to discharge his public function and that the said officer was at that time involved in discharging his public functions. The only remaining element of the alleged offence is whether the obstruction was voluntary that brings me to section 39 of the Penal Code which defines "voluntarily" as,

I

A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

The definition of the term "voluntarily" bears resemblance to the definition of "willfully" current in the English law. (See *Ratanlal & Dhirajlal's Law of Crimes*, 21st edn. P. 82). In *Rice v. Connolly*, Lord Parker, CJ said:

'Wilful' in this context in my judgment means not only 'intention' but also connotes something which is done without lawful excuse.
(emphasis added)

[19] Moreover, s. 39 of the Penal Code provides:

39. "Voluntarily"

A person is said to cause an effect "voluntarily" when he causes it by means whereby he intended to cause it, or by means which, at time of employing those means, he knew or had reason to believe to be likely to cause it.

...

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here A may not have intended to cause death, and may even be sorry that death has been caused by his act; yet, if he knew that he was likely to cause death, he has caused death voluntarily.

[20] The provision of s. 39 of the Penal Code and the authorities quoted, indicate the requirement of *mens rea* for an offence under s. 186 of the Penal Code.

[21] The facts of this case reveal that SP1 was recording the respondent's s. 112 of the Criminal Procedure Code statement. SP1 sought to obtain the password for the respondent's email to which the respondent refused to disclose. For an accurate description of the events, the relevant part of the notes of proceedings is reproduced below:

S: Macam mana Inspektor tanya kepada OKT dan macam mana dia balas?

J: Saya tanya melalui rakam percakapan, saya tanya dan taip dalam rakam percakapan 112 Polis dan dia membalas dia tidak mahu berikan kata laluan kepada saya untuk buat siasatan.

[22] SP1 was conducting an investigation on a police report JBS/0158/18. It was during the course of this investigation that SP1 had taken the witness statement of the respondent, pursuant to s. 112 of the Criminal Procedure Code. A scrutiny of the notes of proceedings reveals that there was no evidence before the learned Magistrate pertaining to the investigation conducted by SP1. What was before the court was on the testimony of SP1.

[23] Exhibit P1, the police report lodged by SP1 is reproduced below:

> Pada tarikh 29/5/2019 jam lebih kurang 1230hrs semasa saya berada di Pejabat BSJK IPD JBS untuk rakam percakapan lanjut keterangan saksi penama Ravichanthiran a/l Ganesan KP: 621221-05-5649 di bawah seksyen 112 KTJ bagi mendapatkan butiran ID dan password akaun Gmail bersabit siasatan bersangkut repot JBS/15813/18 penama enggan memberikan maklumat tersebut dan atas alasan akaun Gmail yang disiasat mengandungi dokumen firma yang sulit dan privileged. Tindakan beliau adalah bertentangan dengan seksyen 116B KTJ. Laporan polis dibuat bagi membolehkan siasatan dijalankan di bawah seksyen 116 KK. Sekian aduan saya.

[24] To recapitulate, exh. P1 states that SP1 was recording the witness statement of the respondent as part of an investigation. The respondent did not provide the Gmail ID and password on the grounds that it contains documents which are confidential and privileged.

[25] The issue before this court therefore is whether the refusal of the respondent to provide the information requested by SP1 amounts to an offence under s. 186 of the Penal Code. To answer this issue, it would be prudent to consider the provision of s. 112 of the Criminal Procedure Code. Section 112 of the Criminal Procedure Code provides:

> **112. Examination of witnesses by police.**
>
> (1) A police officer making a police investigation under this Chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case and shall reduce into writing any statement made by the person so examined.
>
> (2) Such person shall be bound to answer all questions relating to the case put to him by that officer:
>
> Provided that such person **may refuse to answer any question the answer to which would have a tendency to expose him to a criminal charge or penalty or forfeiture.**
>
> (3) A person making a statement under this section shall be legally bound to state the truth, whether or not such statement is made wholly or partly in answer to questions.
>
> (4) A police officer examining a person under subsection (1) shall first inform that person of the provisions of subsections (2) and (3).
>
> (5) A statement made by any person under this section shall, whenever possible, be taken down in writing and signed by the person making it or affixed with his thumb print as the case may be, after it has been read to him in the language in which he made it and after he has been given an opportunity to make any corrections he may wish. (emphasis added)

[26] Section 112 of the Criminal Procedure Code requires a person making a statement under this section to answer all questions relating to the case. The person is also legally bound to state the truth; whether or not the statement is made wholly or partly in answer to question.

[27] Nonetheless a person making a statement under s. 112 may refuse to answer any question, the answer to which would have a tendency to expose him to a criminal charge or penalty.

[28] Was the respondent's refusal to answer the question posed by SP1 to him voluntarily as required under s. 186 of the Penal Code? Was the respondent within his right to refuse to answer the question? Was the respondent's refusal unlawful? These questions will assist this court in determining whether the respondent's refusal to answer the questions put to him in the recording of a statement pursuant to s. 112 of the Criminal Procedure Code is a wilful act of obstruction.

[29] In this instant case, the respondent had refused to answer the question posed by SP1 relating to the respondent's Gmail ID and password. It is the view of this court that the respondent was well within his right to refuse to answer SP1's question as provided in s. 112 of the Criminal Procedure Code. If the respondent was legally permitted to refuse to answer, would his refusal be considered voluntary? Wilful is not merely intention but includes something done without lawful excuse.

[30] If the respondent was well within his right not to answer SP1's question as stated in s. 112 of the Criminal Procedure Code, would the respondent's refusal to answer make him liable to an offence under s. 186 of the Penal Code? Would the respondent's refusal to answer SP1's question on the grounds of privilege and confidential information amount to obstructing a public servant in discharge of his public function?

[31] This court made reference to the case of *PP v. Nazarid Fernandez* [1953] 1 LNS 75; [1954] 1 MLJ 5 where the court stated:

> I respectfully agree with the decision in the case of *P Kandiah v. Rex* [1953] MLJ 64. I am of opinion that it was correctly decided. Thomson, J, although he expressed himself in different language, came, I think, to the same conclusion as the learned Chief Justice in *Kandiah*'s case (1953) MLJ 64 in the case of *Beh Chai Eng v. Public Prosecutor* [1950] MLJ 158. In that case he said at page 159:
>
> > *That section (section 112 of the Criminal Procedure Code), it is to be noted, does not require a person interviewed by the Police in the course of a police investigation to make a statement the whole of which is true. It only compels him to give truthful answer to such questions as may be put to him.*
> >
> > (emphasis added)

[32] Section 112 of the Criminal Procedure Code allows a person to refuse to answer any question if the answer to the question would have a tendency to expose him to a criminal charge or penalty. In this appeal, the respondent had refused to answer SP1's question when SP1 was taking the respondent's statement pursuant to s. 112 of the Criminal Procedure Code. This, in the view of this court is well within the ambit of s. 112 of the Criminal Procedure Code. It follows therefore, if the respondent was acting in accordance to the provision of s. 112, could his refusal to answer a question make him liable to an offence under s. 186 of the Penal Code?

[33] In this case, the respondent was asked for his email password, which the respondent did not provide. In a case, where the password is required as part of a search, s. 116B of the Criminal Procedure Code may be applicable. Section 116B of the Criminal Procedure Code provides:

> **116B. Access to computerised data.**
>
> (1) A police officer not below the rank of Inspector conducting a search under this Code shall be given access to computerized data whether stored in a computer or otherwise.
>
> (2) Any information obtained under subsection (1) shall be admissible in evidence notwithstanding any other provisions in any written law to the contrary.
>
> (3) For the purpose of this section, "access" includes being provided with the necessary password, encryption code, decryption code, software or hardware and any other means required to enable comprehension of the computerised data.

[34] Section 116B of the Criminal Procedure Code allows a police officer not below the rank of Inspector who was conducting a search to be given access to computerised data whether stored in a computer or otherwise. Access as stated under s. 116B includes password.

[35] Would s. 116B of the Criminal Procedure Code be applicable in this case? From the records of appeal, there was nothing to suggest that the search conducted by SP1 was pursuant to s. 116B of the Criminal Procedure Code. In light of this, this court is of the view the provision of s. 116B of the Criminal Procedure Code is not applicable in this case.

[36] This court is also of the view that the respondent's refusal to give an answer is well within the provision of s. 112 of the Criminal Procedure Code. Consequentially, it cannot be that by exercising his right not to answer the question the respondent is considered to have obstructed a public servant in discharge of his public function.

[37] Moreover, can the act of the respondent in refusing to answer question amount to "obstruction"? For what amounts to obstruction under s. 186 of the Penal Code, this court made reference to *Ratanlal and Dhirajlal's Law of Crimes*, 28th edn, vol. 1 at p. 988 as reproduced below:

> … The word 'obstruction' means actual obstruction, ie, actual resistance or obstacle put in the way of a public servant. The word implies the use of criminal force and mere threats or threatening language or mere abuse are not sufficient …

[38] The extract from *Ratanlal and Dhirajlal*'s (*supra*) states that obstruction under s. 186 of the Penal Code means actual obstruction which implies the use of criminal force. In the case before this court, the respondent had refused to answer a question put to him by SP1. From the facts of the case, there were no issue of actual physical obstruction or criminal force.

[39] For this reason, this court finds that the refusal of the respondent to answer a question pursuant to s. 112 of the Criminal Procedure Code cannot amount to voluntarily obstructing a public servant in the discharge of his public function.

(ii) Such Obstruction Must Be In The Discharge Of Public Functions Of Such Public Servant

[40] In relation to the charge proffered against the respondent, the issue raised before this court was that the charge was defective. In relation to a charge, this court made reference to ss. 152 and 153 of the Criminal Procedure Code which are reproduced below:

> **152. Form of charge**
>
> (1) Every charge under this Code shall state the offence with which the accused is charged.
>
> (2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.
>
> (3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.
>
> (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.
>
> (5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.
>
> (6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

153. Particulars as to time, place and person

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164:

Provided that the time included between the first and last of such dates shall not exceed one year.

(3) When the accused is charged with an offence relating to publication by electronic means, the place of publication is where the publication is seen, heard or read by any person.

[41] A charge is required to contain the particulars of the offence. This is to ensure an accused person is clearly informed of the charge against him. In the case of *Ah Poon & Ors v. PP* [2006] 5 CLJ 521 the court stated the following in relation to the drafting of charges:

> [26] *Drafting correct charges and to have included all the required particulars and ingredients essential to the offence is an important part and responsibility of the prosecution and unless the charge is correctly drafted and contains all the essential ingredients of the offence* and exclude all irrelevant ingredients, there can be no admission or plea of guilty to an offence which is not recognized in law and confusing and therefore the plea of guilty should not be accepted by the court … In fact, it is certainly not the duty of the accused to perfect the charge for the prosecution and they are at liberty to take advantage of an imperfect or defective charge … (emphasis added)

[42] In this instant case, did the charge have the necessary particulars so as to inform the respondent clearly of the charge against him? To answer this question, this court will reproduce the charge:

Pertuduhan Pindaan

Bahawa kamu pada 29.5.2019 jam lebih kurang 1230 tengah hari bertempat di Pejabat Siasatan Jenayah Komersial IPD Johor Bahru Selatan, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Takzim, telah dengan sengaja telah menghalang anggota polis menjalankan tugas dengan enggan memberi kerjasama bagi membantu siasatan yang sedang dijalankan. Oleh yang demikian, kamu telah melakukan suatu kesalahan dan boleh dihukum di bawah seksyen 186 Kanun Keseksaan.

[43] From the notes of proceedings, it is evident that the charge was amended to include the words "dengan sengaja". The offence under s. 186 of the Penal Code requires the element of *mens rea* to be present. (See *PP v. Mohamad Sabu* [2012] 5 CLJ 246; [2012] 7 MLJ 547). By including the words "dengan sengaja" in the charge, is the charge proper?

[44] In this case, the offence is s. 186 of the Penal Code for obstructing a public servant in discharge of his public functions. A perusal of the charge against the respondent does not show that it was an obstruction in the discharge of his public functions.

[45] In this regard, allusion is made to the case of *PP v. Mohamad Sabu* [2012] 5 CLJ 246; [2012] 7 MLJ 547 where the High Court held:

> [24] The second ingredient of the offence under s. 186 reads 'such obstruction must be in the discharge of public functions of such public servant'. This expression is also not mentioned or missing from the charge. The relevant part of the charge states, *inter alia*, '… dalam melaksanakan waran tangkap terhadap kamu yang dikeluarkan oleh Mahkamah Majistret Jalan Duta, Kuala Lumpur rujuk 239-07, yang mana pegawai polis ini (ie, Supt. Mohd. Nasir bin Salleh) adalah sebagai penjawat awam yang diberi kuasa menyampaikan waran tangkap itu terhadap kamu seperti yang diperuntukkan kuasa di bawah s. 40(1) Kanun Acara Jenayah (Akta 953)'. The charge says that Supt Mohd Nasir bin Salleh, a public servant was conferred with the power to serve (should read 'execute') the warrant of arrest No 239-07 issued by the Magistrate's Court, Jalan Duta, Kuala Lumpur on the respondent in pursuant of s. 40(1) of the Criminal Procedure Code ('CPC'). This averment is incorrect or inaccurate and misconceived.

[46] The learned judge in the same case at para. 27 stated:

> [27] A proper and correct charge for an offence to voluntarily obstruct a public servant in the discharge of his public functions under s. 186 is exemplified in the book entitled '*Pendakwaan Jenayah Di Mahkamah Rendah*', Edisi Kedua by Teo Say Eng at p 429 as follows:
>
> > Bahawa kamu, pada atau di sekitar … haribulan … di … telah dengan sukarela menghalang seorang penjawat awam, iaitu … dalam menjalankan fungsi awamnya dan bahawa kamu adalah dengan ini melakukan kesalahan yang boleh dihukum di bawah seksyen 186 Kanun Keseksaan.

[47] A condensation of the authorities demonstrate that for an offence under s. 186 of the Penal Code, the element that the offender had voluntarily obstructed a public servant in discharge of his public function must be present. The charge must state that the public servant was carrying out his public function when he was obstructed by the respondent. In this instant case, a scrutiny of the charge finds this element missing. For this reason, this court therefore finds the charge against the respondent to be defective.

A

Decision

[48] For the above stated reasons, this court finds that the learned Magistrate had not erred when she acquitted and discharged the respondent without calling for his defence. This court affirms and upholds the decision of the learned Magistrate. This appeal is therefore dismissed.

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